ABDUL SAMAD ALIAS (RECEIVER AND MANAGER OF RAJIV ENTERPRISES SDN. BHD.)

v.

GOVERNMENT OF MALAYSIA & 2 ORS.

FEDERAL COURT, KOTA BHARU
TAN SRI DATO' MOHD AZMI KAMARUDDIN FCJ
DATO' WAN ADNAN ISMAIL FCJ
DATO' SHAIK DAUD MOHD. ISMAIL JCA
[CIVIL APPEAL NO: 01-73 OF 1993]
30 AUGUST 1996

RECEIVERS & MANAGERS: *Assets in hands of Receiver - Competing claims - Priorities - Claim by Government for sales tax - Whether a civil debt - Whether to be paid out in priority to claim of debenture holder - Whether tax collected put into separate account - Sections 69 & 70 Sales Tax Act 1972 - Whether conferring any priority for sales tax over other debts - Government Proceedings Act 1956 s. 10 - Companies Act 1965 ss. 191, 292 - Sales Tax Act 1972 - Sections 69, 70.*

RECEIVERS & MANAGERS: *Assets in hands of Receiver - Claims by employees of company - Section 292(1)(b) Companies Act 1956 - Competing claims by Government and debenture holder - Utilisation of assets - Whether claims of employees to be paid out only from floating charge realisations - Whether entire floating charge realisations could be utilised.*

COMPANY LAW: *Reveivership - Receivership costs - Payment out of - Receivership costs to be borne out by both the fixed charge realisations and the floating charge realisations - Proper formula.*

Pursuant to the terms of a debenture, the appellant was appointed the Receiver and Manager (the Receiver) of Rajiv Enterprises Sdn. Bhd. (Rajiv) by United Asian Bank Bhd (the Bank). Having managed and sold the assets of Rajiv, the Receiver issued a statement of receipts that showed a gross realisation of RM226,000, comprising both the fixed charge realisations and the floating charge realisations. Costs of Receivership, as claimed, was RM88,256.43, leaving a nett asset realisation of RM138,343.57.

There were three creditors competing for the sums, namely (i) the Bank (ii) the Government of Malaysia (the Government) and (iii) 14 employees of Rajiv (the employees). The sums realised were insufficient to meet the claims, and the Receiver, hence, applied to the High Court for directions pursuant to s. 183(3) of the Companies Act 1965. The learned Judge ruled that the Government's claim, which was in the form of sales tax assessed pursuant to the Sales Tax Act 1972, being a civil debt, was entitled to a preferential

treatment by virtue of s. 10 of the Government Proceedings Act 1956, and therefore, must be paid out in priority to the claims of the debenture holder, the Bank.

The Receiver appealed. Before the learned appeal Judges, the Receiver maintained that the Bank was entitled to the sums as the monies were in fact realisations of assets charged to the Bank by virtue of the debenture. The Government argued that they were entitled to priority by reason of s. 70 of the Sales Tax Act 1972. It was also the Government's contention that, to determine the conflicting claims, the Court ought to look only to the provisions of the Sales Tax Act 1972, and that the provisions of ss. 191 and 292 of the Companies Act 1965 were entirely irrelevant.

The employees, on their part, claimed for a sum of RM21,000 and in the process invoked s. 292(1)(b) of the Companies Act 1965. The Receiver did not dispute the employees' claims. Nevertheless, as the employees were only entitled to be paid out of floating charge realisations, and not of fixed charge realisations, disputes arose as to the actual amount of the floating charge realisations, and also as to whether those realisations were entirely available for the payment of the preferential claims of the employees. The employees contended that the assets that were subject to the floating charge was RM82,600 inclusive of the RM20,000 realised from the forfeiture of a deposit for sale of machinery under the fixed charge. The Receiver maintained that the sum was exclusive of the RM20,000 and that there was only RM62,600 to the floating charge realisations.

The primary issues that arose pertained (i) to the true construction of s. 70 of the Sales Tax Act 1972 and (ii) to the manner in which the realisations of the assets of Rajiv ought to be utilized to meet the competing claims.

Held:

Per Wan Adnan Ismail FCJ (delivering the judgment of the Court):

[1] It must now be regarded as settled law that ss. 69 and 70 of the Sales Tax Act 1972 do not operate to confer any priority for sales tax over other debts. It must also be regarded as settled that s. 292(1) of the Companies Act 1965 must be read as an exception to the general provisions of s. 10(1) of the Government Proceedings Act 1956.

[2] It is erroneous to say that the provisions of ss. 191 and 292 of the Companies Act 1965 do not apply. As it is the two sections will come into play once a Reveiver has been appointed. Whilst it is true that a taxable person collects the sales tax for the Government, the Government cannot claim priority over such monies once a Receiver has been appointed. The argument will be tenable only if the monies collected by Rajiv as sales tax were put into a separate special account. There is no evidence here

that monies so collected were put into such an account. They must have been put into the mixed account of Rajiv. In the circumstances, the learned Judge was wrong in directing that sales tax due to the Government be paid in priority to the claim of the debenture holder. That direction is to be set aside.

[3] As the sum of RM20,000 was directly obtained from an aborted sale of fixed charge assets, it should be considered as monies subject to the fixed charge. Therefore, there is only the sum of RM62,600 to the floating charge realisations and not RM82,000.

[4] As for the fixed charge realisations, which herein amounted to RM164,000, the Bank's claim will take priority over the claims of both the Government and the employees. As to the floating charge realisations, of which there was RM62,600 in the hands of the Receiver, the employees' claim under s. 292(1)(b) Companies Act 1965 will take priority over the claim of the Bank.

[5] Not all of the sum of RM62,000 that constituted the floating charge realisations is available for distribution to the employees. A portion of that sum must first be used to satisfy a portion of the costs and expenses of the receivership.

[6] The receivership costs, however, also have priority over the claim of the Bank to be paid out of the assets subject to the fixed charge. Accordingly, in this case, a situation exists where the receivership costs can be paid out of either the fixed charge realisations or the floating charge realisations. This being the case, it follows that the amount that the Bank or the employees will receive will depend on which fund the receivership costs are paid out.

[7] It is not fair for the receivership costs to be paid out wholly out of the floating charge realisations fund or wholly out of the fixed charge realisations fund. The proper way is to apportion the costs between the two funds. However, in order to do that, there must first be an assessment as to the respective costs of realising the fixed charge assets as well as the floating charge assets, after which the costs of realising the fixed charge assets would be deducted from the fixed charge realisations fund and the costs of realising the floating charge assets would be deducted from the floating charge realisations fund. In relation to costs that cannot be attributed towards the realisations of either, the costs should be borne by the funds *prorata*.

[8] In the result the amount that will be available from which the claims of the employees are to be paid out will be the sum of RM62,000 less the amount ascertained as the costs and expenses and fees of the Receiver that are attributable to the floating charge realisations and the apportioned

prorata costs and expenses of the Receiver that cannot be attributable to either the floating charge realisations or the fixed charge realisations.

[Appeal allowed. Order accordingly]

***[Bahasa Malaysia** Translation of Headnotes]*

***PENERIMA & PENGURUS:** Aset di tangan Penerima - Tuntutan bersaing - Keutamaan - Tuntutan oleh Kerajaan untuk cukai jualan - Samada suatu hutang sivil - Samada harus dibayar dengan mendapat keutamaan ke atas tuntutan pemegang debentur - Samada cukai yang dipungut diletakkan dalam akaun yang berasingan - Seksyen 69 & 70 Akta Cukai Jualan 1972 - Samada memberikan keutamaan kepada cukai jualan berbanding dengan hutang-hutang lain - Akta Prosiding Kerajaan 1956 s. 10 - Akta Syarikat 1965 ss. 191, 292 - Akta Cukai Jualan 1972 ss. 69, 70.*

***PENERIMA & PENGURUS:** Aset di tangan Penerima - Tuntuan pekerja-pekerja syarikat - Seksyen 292(1)(b) Akta Syarikat 1965 - Tuntutan saingan oleh Kerajaan dan pemegang debentur - Pelupusan aset - Samada tuntutan pekerja-pekerja boleh dibayar hanya dari perolehan caj terapung - Samada keseluruhan perolehan caj terapung boleh digunakan.*

***UNDANG-UNDANG SYARIKAT:** Penerimaan - Kos penerimaan - Pembayaran - Kos penerimaan dibayar melalui kedua-dua perolehan caj terapung dan perolehan caj tetap - Formula yang betul.*

Berdasarkan terma suatu debentur, perayu dilantik oleh United Asian Bank Bhd. (Bank) sebagai Penerima dan Pengurus (Penerima) Rajiv Enterprises Sdn. Bhd. (Rajiv). Penerima telah mengurus dan menjual harta Rajiv, dan selepas itu mengeluarkan penyata penerimaan yang menunjukkan penghasilan kasar sebanyak RM226,000, mencangkupi perolehan bagi kedua-dua caj terapung dan caj tetap. Kos penerimaan, sebagaimana dituntut, berjumlah RM88,256.43 yang bermakna perolehan bersih aset ialah sebanyak RM138,343.57.

Terdapat tiga pemiutang yang bersaing untuk jumlah di atas, iaitu (i) Bank (ii) Kerajaan Malaysia (Kerajaan) dan (iii) 14 pekerja Rajiv (pekerja-pekerja). Jumlah yang diperolehi, bagaimanapun, tidak mencukupi untuk menampung kesemua tuntutan, dan Penerima, dengan sebab itu, memohon kepada Mahkamah Tinggi untuk arahan-arahan di bawah s. 183(3) Akta Syarikat 1965. Hakim yang bijaksana memutuskan bahawa tuntutan Kerajaan, yang berbentuk cukai jualan yang dinilai berdasarkan Akta Cukai Jualan 1972, adalah suatu hutang sivil, dan kerana itu berhak kepada layanan istimewa di bawah s. 10 Akta Prosiding Kerajaan 1956 dan harus dibayar sebagai suatu keutamaan ke atas tuntutan Bank sebagai pemegang debentur.

Penerima merayu. Di hadapan Hakim-hakim rayuan yang bijaksana, Penerima berhujah bahawa Bank berhak kepada jumlah di atas oleh kerana wang tersebut adalah sebenarnya perolehan dari aset yang telah digadaikan kepada Bank melalui suatu debentur. Kerajaan berhujah bahawa mereka mendapat keutamaan berdasarkan peruntukan s. 70 Akta Cukai Jualan 1972. Adalah juga hujah Kerajaan bahawa, untuk menyelesaikan tuntutan-tuntutan yang bersaing di sini, Mahkamah hanya perlu melihat kepada peruntukan-peruntukan Akta Cukai Jualan 1972, dan keseluruhan peruntukan-peruntukan ss. 191 dan 292 Akta Syarikat adalah tak berkaitan.

Pekerja-pekerja, di pihak mereka, menuntut sejumlah RM21,000 di bawah s. 292(1)(b) Akta Syarikat 1965. Tuntutan pekerja-pekerja ini tidak disangkal oleh Penerima. Namun begitu, oleh kerana pekerja-pekerja hanya berhak dibayar dari perolehan caj terapung, dan tidak dari perolehan caj tetap, timbul persoalan berhubung jumlah sebenar perolehan caj terapung yang ada, dan juga, samada keseluruhan perolehan tersebut boleh digunakan untuk membayar tuntutan yang diutamakan pekerja-pekerja tersebut. Pekerja-pekerja mengatakan bahawa aset yang tertakluk kepada caj terpung berjumlah RM82,600 dan termasuk RM20,000 yang diperolehi dari rampasan deposit ke atas jualan suatu mesen yang tertakluk kepada caj tetap. Penerima berhujah bahawa jumlah RM20,000 tersebut bukan sebahagian dari perolehan caj terapung dan jumlah perolehan caj terapung hanyalah RM62,600 sahaja.

Isu-isu penting yang timbul adalah berkaitan (i) pentafsiran sebenar s. 70 Akta Cukai Jualan 1972 (ii) cara bagaimana perolehan aset di atas harus diagihkan bagi memenuhi tuntutan-tuntutan bersaing tersebut.

Diputuskan:

Oleh Wan Adnan Ismail HMP (menyampaikan keputusan Mahkamah):

[1] Ianya harus dianggap sebagai undang-undang yang terpakai lama bahawa ss. 69 dan 70 Akta Cukai Jualan 1972 tidak memberikan apa-apa keutamaan kepada cukai jualan berbanding dengan hutang-hutang lain. Ianya harus juga dianggap sebagai sudah diputuskan bahawa s. 292(1) Akta Syarikat 1965 perlu dibaca sebagai satu kecualian kepada peruntukan umum s. 10(1) Akta Prosiding Kerajaan 1956.

[2] Adalah silap untuk mengatakan bahawa peruntukan ss. 191 dan 292 Akta Syarikat 1965 tidak terpakai di sini. Sebagaimana halnya, kedua-dua seksyen ini mempunyai peranan sebaik sahaja seorang Penerima dilantik. Sementara ianya benar bahawa pemungut cukai memungut cukai bagi pihak Kerajaan, Kerajaan tidak boleh menuntut keutamaan ke atas wang tersebut sebaik sahaja Penerima dilantik. Hujah Kerajaan hanya boleh diketengahkan jika wang yang dipungut oleh Rajiv sebagai cukai jualan diletakkan ke dalam satu akaun khas. Tidak terdapat keterangan di sini bahawa wang sedemikian dipungut dan diletakkan dalam akaun khas. Wang tersebut jelas

diletakkan di dalam akaun Rajiv yang bercampur. Oleh yang demikian, Hakim adalah silap bilamana mengarahkan cukai jualan yang terakru kepada Kerajaan kena dibayar dan mendapat keutamaan berbanding tuntutan pemegang debentur. Arahan tersebut haruslah diketepikan.

[3] Oleh kerana jumlah RM20,000 tersebut diperolehi dari penjualan harta caj tetap yang terbengkalai, ianya harus dianggap sebagai wang yang tertakluk kepada caj tetap. Dengan demikian, hanya ada RM62,600 dalam perolehan caj terapung dan bukannya RM82,600.

[4] Berhubung perolehan caj tetap, yang menjangkau angka RM164,000 di sini, tuntutan Bank hendaklah mengambil keutamaan ke atas kedua-dua tuntutan Kerajaan dan pekerja-pekerja. Bagi perolehan caj terapung, di mana jumlah ditangan Penerima ialah RM62,600, tuntutan pekerja-pekerja di bawah s. 292(1)(b) Akta Syarikat mendapat keutamaan berbanding dengan tuntutan Bank.

[5] Bukan kesemua jumlah RM62,600 yang merupakan perolehan caj terapung itu boleh diagihkan kepada pekerja-pekerja. Sebahagian daripadanya mestilah digunakan bagi menampung kos and belanja penerimaan.

[6] Kos penerimaan, bagaimanapun, mempunyai keutamaan juga terhadap tuntutan Bank yang dibayar melalui aset yang tertakluk kepada caj tetap. Dengan itu, dalam kes di sini, terdapat situasi di mana kos penerimaan boleh dibayar samada menerusi perolehan caj terapung ataupun caj tetap. Oleh kerana inilah keadaannya, ianya mengikut bahawa amaun yang akan diterima oleh Bank ataupun pekerja-pekerja akan bergantung kepada kumpulanwang manakah yang akan digunakan untuk membayar kos penerimaan.

[7] Ianya tidak adil jika kos penerimaan dibayar sepenuhnya dari perolehan caj terapung, atau sepenuhnya dari perolehan caj tetap. Cara yang wajar ialah dengan mengagihkan pembayaran menerusi kedua-dua kumpulanwang tersebut. Bagaimanapun, untuk berbuat demikian, mestilah terlebih dahulu dibuat penilaian yang berasingan tentang kos-kos yang terlibat bagi mendapatkan perolehan caj tetap dan caj terapung tersebut, selepas mana, kos yang dibelanjakan bagi mendapatkan perolehan caj tetap akan ditolak dari kumpulanwang perolehan caj tetap, dan kos yang terbabit bagi mendapatkan perolehan caj terapung akan ditolak dari kumpulanwang perolehan caj terapung. Berhubung dengan kos yang tidak dapat dipertanggungkan kepada mana-mana perolehan tersebut, kos sedemikian hendaklah ditanggung secara *prorata*.

[8] Sebagai akibatnya, amaun yang boleh digunakan untuk memenuhi tuntutan pekerja-pekerja ialah jumlah RM62,000 berkenaan, ditolak amaun yang ditetapkan sebagai kos dan perbelanjaan serta fee Penerima yang boleh dihubungkan kepada perolehan caj terapung dan juga kos Penerima yang

diagihkan secara prorata yang tidak dapat dihubungkan samada kepada perolehan caj terapung ataupun perolehan caj tetap.

[Rayuan dibenarkan. Perintah sekadarnya].

Cases referred to:

Annuarul Aini & Anor. v. Ketua Pengarah Kastam Dan Eksais Diraja Malaysia, Johore Bahru [1991] 1 MLJ 360; 1991 (1) CLJ 495 ***(refd)***

Director of Customs, Federal Territory v. Ler Cheng Chye, Liquidator of Castwell Sdn. Bhd. (in liquidation) [1995] 2 AMR 2007; 1995 (3) CLJ 316 ***(foll)***

Federal Commissioner of Taxation And Another v. The Official Liquidator of EO Farley Limited (In Liquidation) and Another [1940] 63 CLR 278 ***(foll)***

Indo Malaysia Engineering Co. Bhd. v. Muniandy Rengasamy & Ors. [1990] 3 MLJ 301 ***(cit)***

Waters v. Widdows [1984] VR 503 ***(foll)***

Legislation referred to:

Companies Act 1965, ss. 183(3), 191, 292(1)(c)
Employment Act 1955, s. 69
Government Proceedings Ordinance, 1956, s. 10
Government Proceedings Act, 1956, s. 10(1)
Sales Tax Act 1972, s. 69, 70

For the appellant - S. Suhendran; M/s. Saheran & Woon
For the 1st & 2nd respondents - Allaudeen Ismail, Senior Federal Counsel

JUDGMENT

Wan Adnan Ismail FCJ:

By this originating summons the appellant/plaintiff applied to the High Court for the following directions under s. 183(3) of the Companies Act 1965:

(a) (i) whether, upon the true construction of s. 70 of Sales Tax Act 1972, sums due from a company in the form of tax assessed under the said Sales Tax Act 1972 is to be paid by a Receiver and Manager of the company in priority to a claim of a holder of a debenture registered under s. 108 of the Companies Act 1965 out of assets of the company thereby;

(ii) if the answer to (a)(i) above is in the affirmative, whether the sums claimed by the defendants from Rajiv Enterprises Sdn. Bhd. (in receivership) by way of Sales Tax is to be paid by the plaintiff out of realisations of assets subject to a fixed charge granted in favour of United Asian Bank Bhd as the debenture holder concerned in priority to the claim of the said debenture holder;

(iii) if the answer to (a)(i) and (ii) above is in the affirmative, whether the plaintiff as the receiver and manager is entitled to first utilize the realisations of assets subject to the floating charge in satisfaction of sums claimed by the defendants before utilizing fixed charge realisations;

(iv) if the answer to (a)(i) and (ii) above is in the affirmative, whether the claim of the defendants by way of Sales Tax is to be paid in priority to the costs of the receivership and the remuneration of the Receiver and Manager;

(b) whether upon the true construction of s. 70 of the Sales Tax Act 1972, sums due in the form of tax assessed under the Sales Tax Act 1972 is to be paid in priority to a claim of the preferential creditors within the meaning attributed thereto by s. 191 and s. 292 of the Companies' Act 1965;

(c) whether upon the true construction of s. 191 when read together with s. 292 of the Companies Act, sums due in the form of tax assessed under the Sales Tax Act, 1972 prior to the appointment of a Receiver and Manager is a preferential debt to be paid by the plaintiff in priority to a claim of a holder of a debenture registered under s. 108 of the Companies Act, 1965;

(d) the manner in which the realisations of the assets of Rajiv Enterprises Sdn. Bhd. ought to be utilized in meeting the claims of the defendants, the costs of the receivership, the said debenture holder and the preferential creditors of Rajiv Enterprises Sdn Bhd;

The learned High Court Judge after hearing the parties and relying on the case of *Annuarul Aini & Anor. v. Ketua Pengarah Kastam Dan Eksais Diraja Malaysia, Johore Bahru* [1991] 1 MLJ 360; [1991] 1 CLJ 495 directed that the claims of the government in respect of sales tax assessed pursuant to the Sales Tax Act 1972 be paid in priority to the claims of the debenture holder.

The plaintiff now appeals against that direction.

The plaintiff is the Receiver and Manager of Rajiv Enterprises Sdn. Bhd. (Rajiv) appointed by the United Asian Bank Bhd. (the Bank) on 29 December 1988 pursuant to the terms of the debentures dated 15 November 1980. The Receiver managed Rajiv for profit and later sold the assets of Rajiv. The statement of receipt and payments in respect of the sale is as follows:

(1) Sale of fixed assets	RM144,000
(2) Sale of floating charge assets	2,000
(3) Received from trading	60,600
(4) Forfeiture of deposit for sale of machinery and equipment under the fixed charge	20,000
	226,600
Less costs of Receivership	88,256.43
Total realisation	138,343.57

There are three creditors of Rajiv that compete for the monies now in the hands of the Receiver namely the sum of RM138,343.57. They are:

(1) The Bank for the sum of RM633,326.68 due and owing under the terms of the debenture.

(2) The Government of Malaysia who claims the sum of RM105,585.10 by way of sales tax for the years 1984 to 1986.

(3) The employees of Rajiv who claim RM138,290.44 which are sums due by way of termination, benefits etc. pursuant to an award under s. 69 of the Employment Act 1955 made on 6 May 1989.

There are insufficient assets to meet the claims of all the three creditors. Hence, the application for directions under s. 183(3) of the Companies Act 1965.

The Receiver maintained that the Bank was entitled to the sums that were held by the Receiver as the sums that were so held were the realisations of assets charged to the Bank by virtue of the debenture. The Government maintained that they were entitled to priority by reason of s. 70 of the Sales Tax Act, 1972 or s. 10 of the Government Proceedings Ordinance, 1956. The employees claimed they had priority by reason that their claim fell within the definition of "worker's compensation" in s. 191 when read together with s. 292 (c) of the Companies Act 1965.

The learned Judge gave his decision on 29 November 1993. In his written judgment he said that he was bound to follow the decision in *Annuarul Aini & Anor. v. Ketua Pengarah Kastam dan Eksais Diraja Malaysia, Johore Bahru* [1991] 1 MLJ 360 since that decision had been approved by the Supreme Court. The learned Judge said:

> As has been stated it is conceded by the applicant that the authority which settles the law is the case of *Annuarul Aini & Anor. v. Ketua Pengarah Kastam dan Eksais Diraja Malaysia, Johore Bahru* [1991] 1 MLJ 360 since it has the approval of the Supreme Court.

At page 363 the learned Judge wrote:

> As sales tax is a civil debt then s. 10 of the Government Proceedings Act 1956 applies. Section 10 gives this debt a preferential treatment for payment over "all debts or claims of every kind which shall subsequent to such date, have been contracted or incurred by or become due person to any other person whomsoever except any right vested in by virtue of a mortgage or charge of immovable property duly registered in the manner provided by the registration of such mortgage or charge.

Since the learned Judge's decision, the Federal Court had come out with a decision on the matter in the case of *Director of Customs, Federal Territory*

v. Ler Cheng Chye, Liquidator of Castwell Sdn. Bhd. (in liquidation) [1995] 2 AMR 2007; 1995 (3) CLJ 316.

In this case the liquidator had come to the High Court also on the issue of priority.

Wan Yahya b. Pawan Teh, FCJ speaking for the Federal Court said:

> The stand taken by the Customs in the High Court was based on the argument of a conflict between s. 69(1) of the Sales Tax Act, 1972 and s. 292 of the Companies Act, 1965 in which case the *maxim lex posterior derogat priori* should apply and secondly the Sales Tax Act, 1972 being a special law enacted after the Companies Act, 1965, the principle of *generalia speciablibus non derogant* should likewise be applied. Lastly Counsel contended that s. 10(1) and (2) of the Government Proceedings Ordinance, 1956 would in any event confer priority of the payment of the sales tax over the claim of the debenture holders.
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> The learned Judge then adopting the same rationale as in *Annuarul Aini & Anor. v. Ketua Pengarah Kastam & Eksais Diraja Malaysia, Johore Bahru* [1991] 1 MLJ 360 held that s. 69 of the Sales Tax Act, 1972 is an administrative direction and as such the provisions of that section did not conflict with that of s. 292 of the Companies Act. Accordingly the learned Judge held that the *maxim lex posterior derogat priori* did not apply and so he ruled that the customs were not entitled to any priority under s. 69 of the Sales Tax Act 1972.
>
> The central point of argument before the High Court appeared to have been for the most part directed at the implication on s. 292 of the Companies Act and s. 69 of the Sales Tax Act. Perhaps for that reason, another relevant provision of the law i.e. s. 10(1) of the Government Proceedings Act, 1956 was not adequately adjudicated on.

The Federal Court then considered s. 69 of the Sales Tax Act, 1972 which reads as follows:

> (1) Where after the passing of this Act an effective resolution is passed or an order is made for the winding-up of a company which is a licensed manufacturer the liquidator of the company shall give notice thereof to the Director General within fourteen days thereafter, and shall before disposing of any of the assets of the company set aside such sum out of the assets as appears to the Director General to be sufficient to provide for any sales tax that is or will thereafter become payable in respect of the company.

Wan Yahya, FCJ continued:

> Two High Court authorities of particular application to the above section were cited in argument before us. The first of the two is the case of *Annuarul Aini & Anor. v. Ketua Pengarah Kastam Eksais Diraja Malaysia, Johore Bahru* [1991] 1 CLJ 495; [1991] 1 MLJ 361.
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> In that decision, the learned trial Judge held *inter alia* that:

(i) Section 70 of the Sales Tax Act, 1972 (in our appeal s. 69) merely sets out the duties of the receivers and does not provide a priority of payment for sales tax over other debts; and

(ii) sales tax being a civil debt is subject to a preferential payment over other debts.

After considering the Australian High Court decision in the *Federal Commissioner of Taxation And Another v. The Official Liquidator of EO Farley Limited (In Liquidation) and Another* [1940] 63 CLR 278, the Federal Court said:

> We are entirely in agreement with the above rationale. If at all the customs has priority right it must be a right over a debt as a whole where the amount is specified. Section 69 of our Sales Tax Act does not, in terms of its construction, direct payment away of the money so set aside nor does it instruct in any way how that money is to be applied and yet the Sales Tax Act, 1972 was enacted well after the Companies Act, 1965. The only requirement contained in that section is for the liquidator to set aside a sum sufficient to provide for tax payable then or thereafter. The sum to be set aside pursuant to the statute may not be necessarily the same as what is actually payable. The legislature could not have forgotten about the priority right as contained in s. 292 of the Companies Act, 1965 when it enacted that provision on the Sales Tax Act, 1972. On the true construction of these two sections, we conclude that the omission to mention both matters i.e. on payment out and priority were deliberate acts of the legislature. We are firmly of the view that s. 69 of the Sales Tax Act, 1972 is merely directive in nature. It merely directs the setting aside of moneys sufficient to provide for taxation but does not provide that Government debts shall rank in priority to all other secured debts. If the legislature had intended, otherwise, it would have conferred that privilege in as clear and unequivocal words as possible.

The Federal Court then went to consider the effect of s. 10(1) of the Government Proceedings Act, 1956 over s. 292(1) of the Companies Act, 1965. After considering the provisions of the two sections the Federal Court said:

> Sales tax is a Federal tax within the meaning of s. 292(1)(f) of the 1965 Act and being a tax due to the government it would likewise fall under the provision of s. 10(1) of the 1956 Act. Discernibly there is a conflict between the 1956 Act which conferred priority to the sales tax above all debts, and the 1965 Act which ranked such tax as the sixth in priority amongst unsecured debts.
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> Where there are two conflicting provisions of the legislature and the question arises which of the two should govern the case, it is the Court's duty to see the terms of which provisions are more appropriate in the circumstance of the case. The principle of linguistic cannons of construction on the use of legal maxims may provide the answer to our case.

The relevant maxim in the present appeal is general *specialibus non derogant* - general statements or provisions do not derogate from special statements or provisions, or conversely, *specialia derogant generalibus* - special provisions derogate from general. The Government Proceedings Act, 1956 was enacted to provide generally the rights of the government to sue, its liability, jurisdiction and procedure. Section 10(1) provides in non specific and general terms that all debts due and claims owing to the Government shall enjoy preferential payments over other competing debts or claims which arise subsequent to the date of accrual of such Government claim. The phrases 'all debts due'; 'claims of every kind'; 'from such persons to any other person whomsoever' are plainly general words and general words are to be understood generally - *generalia verba sunt generalita intelligenda.*

In contrast, ss. 291 and 292 of the Companies Act, 1965 are special provisions dealing with a subject distinctive to companies. They relate to the respective rights of secured and unsecured creditors in a winding up of an insolvent company and make express mention of federal tax (which by virtue of s. 23 of the Sales Tax Act or other related legislation is a debt due to the Government) as ranking sixth in the list of priority amongst other unsecured preferential debts. We have no hesitation in holding that s. 292(1) of the Companies Act, 1965 is a special provision dealing with a particular subject and that it is in conflict with s. 10(1) of the Government Proceedings Act, 1956. Nevertheless we must also assume that the legislature must have had in mind the latter Act when enacting the subsequent Companies Act, 1965 and did not intend to abrogate it altogether. The general rule of construction is such if having made the general Act the legislature afterwards makes a special provision in conflict with the earlier legislation the special provision so in conflict is treated as a mere exception to the general provision.

The Federal Court then concluded:

We are therefore of the view that the *maxim specials derogant generalibus* applies and s. 292(1) of the Companies Act 1965 must be read as an exception to the general provision of s. 10(1) of the Government Proceedings Act, 1956 but otherwise the latter section prevails over other debts.

Finally, the Federal Court said:

On the aforestated reasonings and determination, we have arrived at the conclusion that the proper provisions to apply in deciding the priority of payments in respect of the claims for debt arising from non payment of sales tax are ss. 291 and 292 of the Companies Act, 1965 and the relevant date for the application of priority in this case is the date on which the liquidator was appointed. In our present case the event took place on 14 July 1986. On that date the floating charge became automatically crystallised and the debenture holders' claim was therefore transfixed into a secured debt. On the other hand, the sales tax by the customs is unaffected by the event and continues to retain its characteristic as an unsecured civil debt which ranked sixth in order of priority in that category of debts. The outcome from this situation in this case is obvious. The automatically crystallised debenture debts having attained the characteristic of a secured debt, must be paid first in preference over the unsecured sales tax debts.

Before us the learned Senior Federal Counsel invited us to again reconsider *Annuarul's* case and *Ler Cheng Chye's*. If we were to accede to this request it would result in the same matter being considered by the Federal Court/ Supreme Court three times. The request for the second review of *Annuarul's* case made in *Ler Cheng Chye* was described by the Federal Court as "a brave attempt at reargument of the law in view of the statement from the Bar that the issue in *Annuarul's* case in s. 69 was subsequently taken up, argued before and confirmed by the Supreme Court."

However, the Federal Court did accede to the request and considered *Annuarul's* case afresh and "having done so", the Federal Court said "we have with respect, arrived at the same conclusion on the issue of s. 69 as the previous panel of the Supreme Court and the trial Judge did.

We have to decline this request. It must now be regarded as settled that ss. 69 and 70 of the Sales Tax Act, 1972 do not operate to confer any priority for sales tax over other debts. It must also regarded as settled as decided by the Federal Court in *Ler Cheng Chye* that s. 292(1) of the Companies Act, 1965 must be read as an exception to the general provisions of s. 10(1) of the Government Proceedings Act, 1956.

The learned Senior Federal Counsel then argued that in order to determine the issue of the conflicting claims the Court should only look at the provisions of the Sales Tax Act, 1972. The provisions of ss. 191 and 292 of the Companies Act, 1965 and of s. 10 of the Government Proceedings Act, 1956 were entirely irrelevant. According to him the Sales Tax Act is a special Act which deals with the taxation of all imported and manufactured goods. The Act ensures that all imported and manufactured goods are sold fully taxed and paid. He referred to ss. 6, 16, 17, 19, 22, 26, 28 and 70 of the Act and submitted that from these provisions it was clear that all monies collected by a taxable person as sales tax from the purchasers are collected on behalf of the Government. The monies collected belonged to the Government. The question of priority did not arise. The monies were already Government monies.

After giving careful consideration we are of the view that it is erroneous to say that the provisions of ss. 191 and 292 of the Companies Act do not apply. Once a Receiver has been appointed ss. 191 and 292 will come into play. Whilst it is true that a taxable person collects the sales tax for the Government, the Government cannot claim priority over such monies once a Receiver has been appointed. The argument will be tenable only if the monies collected by Rajiv as sales tax were put into separate special account. But there is no evidence that monies collected as sales tax were put into such an account. They must have been put into the mixed account of Rajiv.

We are therefore of the view that the learned Judge was wrong in directing that sales tax due to the Government be paid in priority to the claim of the debenture holder. The direction is therefore set aside.

Now we will consider the claim of the employees whose claim as stated earlier amounted to RM138,290.44 which are sums due to them by way of wages, overtime pay, indemnity in lieu of notice, annual leave pay and termination benefits pursuant to an award under s. 69 of the Employment Act, 1955 made on 6 May 1989.

The employees originally alleged that their claim took priority over the debts of the Bank by virtue of s. 191 when read together with s. 292(1)(c) of the Companies Act, 1965.

Section 191 of the Companies, Act, 1965 provides as follows:

> 191. Payments of certain debts out of assets subject to floating charge in priority to claims under charge
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> (1) Where a receiver is appointed on behalf of the holders of any debentures of a company secured by a floating charge or possession is taken by or on behalf of debenture holders of any property comprised in or subject to a floating charge, then if the company is not at the time in the course of being wound up, debts which in every winding-up are preferential debts and are due by way of wages salary vacation leave or superannuation or provision fund payments and any amount which in a winding up is payable in pursuance of s. 292 (3) or (5) shall be paid out of any assets coming to the hands of the receiver or other person taking possession in priority to any claim for principal or interest in respect of the debentures and shall be paid in the same order of priority as is prescribed by that section in respect of those debts and amounts.
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> (2) For the purposes of subsection (1) the references in s. 292 (1)(b), (c), (d) and (e) to the commencement of the winding up shall be read as a reference to the date of the appointment of the receiver or of possession being taken as aforesaid (as the case requires).
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> (3) Any payments made under this section shall be recouped as far as may be out of the assets of the company available for payment to general creditors.

Section 292 (1) provides as follows:

> 292 Priorities
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> (1) Subject to this Act, in a winding up there shall be paid in priority to all other unsecured debts
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> (a) firstly, the costs and expenses of the winding up including the taxed costs of a petitioner payable under s. 220, the remuneration of the liquidator and the costs of any audit carried out pursuant to s. 281;
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> (b) secondly, all wages or salary (whether or not earned wholly or in part by way of commission) including any amount payable by way of allowance or reimbursement under any contract of employment or award or agreement regulating conditions of employment, of any employee

not exceeding one thousand five hundred ringgit (or such other amount as may be prescribed from time to time) whether for time or piecework in respect of services rendered by him to the company within a period of four months before the commencement of the winding up:

(c) thirdly, all amounts due in respect of worker's compensation under any written law relating to worker's compensation accrued before the commencement of the winding up;

(d) fourthly, all remuneration payable to any employee, in respect of vacation leave, or in the case of his death to any other person in his right, accrued in respect of any period before the commencement of the winding up;

(e) fifthly, all amounts due in respect of contributions payable during the twelve months next before the commencement of the winding up by the company as the employer of any person under any written law relating to employees superannuation or provident funds or under any scheme of superannuation or retirement benefit which is an approved scheme under the federal law relating to income tax; and

(f) sixthly, the amount of all federal tax assessed under any written law before the date of the commencement of the winding up or assessed at any time before the time fixed for the proving of debts has expired.

But in his written submission to the Court below the learned Counsel for the employees conceded that the employees were entitled to and they now claimed only the sum RM21,000 under s. 292(1)(b) of the Companies Act, 1965. This concession must have been made in the light of the Supreme Court decision in *Indo Malaysia Engineering Co. Bhd. v. Muniandy Rengasamy & Ors.* [1990] 3 MLJ 301. Each of the 14 employees now only claim the sum of RM1,500 being the maximum amount allowed under the sub-section. This claim is agreed to by the learned Counsel for the plaintiff/appellant. There is therefore no dispute between the plaintiff and the employees that the employees are entitled to be paid that sum in priority to the claim of the debenture holder. But the employees are only entitled to be paid out of floating charge realisations and not out of fixed charge realisations. Therefore the remaining dispute between them concerns, firstly, what the actual floating charge realisations are, and secondly, whether the entire floating charge realisations are available for the payment of the preferential claims of the employees.

The employees say that the assets that are subject to the floating charge amount to RM82,600. Whereas the plaintiff says the assets amount to only RM62,600. The dispute is whether the sum of RM20,000 which was the forfeiture of a deposit for the sale of fixed assets should be considered as a fixed charge realisation or floating charge realisation. In this respect we agree with the Counsel for the plaintiff that as the said sum of RM20,000 was directly obtained from an aborted sale of fixed charge assets it should be considered as monies subject to the fixed charge. Therefore in our view there

a is only the sum of RM62,600 that are floating charge realisations. But we are of the view that not all of the said sum is available for distribution to the employees. A portion of that sum must first be used to satisfy a portion of the costs and expenses of the receivership.

b By the terms to the debenture the receivership costs are given first priority over all other claims including the claims of the debenture holder. (see Clause 12 of the debenture dated 28 February 1979). The receivership costs incurred are as follows:

(a) Employees' Salaries and EPF contributions	RM25,532.08
c (b) Receiver and Manager's fee	RM16,380
(e) Costs of Receivership	RM46,433
Total Costs	RM88,256.43

d

The receivership costs also have priority over the claim of the Bank to be paid out of the assets subject to the fixed charge. Accordingly we have a situation where the receivership costs can be paid out of either the fixed charge realisations or the floating charge realisations. The debenture is silent as to *e* from which realisations the receivership costs are to be paid out.

There are clearly two different and distinct funds in the hands of the plaintiff. The first is the fixed charge realisations which amount RM164,000 and the other is the floating realisations which amount to RM62.600. The total *f* receivership costs amount to RM88,256.43. It is not disputed that the Bank is entitled to the whole amount of the fixed charge realisations and that the employees are entitled to be paid only out of the floating charge realisations. The amount that the Bank on the one hand and the employees on the other, will actually receive in satisfaction of their claims will depend on which fund *g* the receivership costs are paid out. It is clear that if the receivership costs are to be paid wholly out of the floating charge realisations fund, there will be nothing left to satisfy the employees' preferential claim. This will not be fair. Similarly, if the receivership costs are to be paid solely out of the fixed charge realisations fund the Bank will have to suffer the entire payment of *h* the costs of the receivership. This also is not fair. In our view the proper way to deal with the problem is to apportion the receivership costs between the floating charge realisations fund and the fixed charge realisations fund. In order to do that there must first be an assessment as to the costs of realising the fixed charge assets and the costs incurred in realising the floating charge assets and the carrying on of the business of the company to obtain the floating *i* charge realisations fund. Then the costs of realising the fixed charge assets should be deducted from the fixed charge realisations fund and the costs of realising the floating charge realisations should be deducted from the floating

charge realisations fund. In relation to costs that cannot be attributed towards the realisations of either the fixed or floating charge realisations the costs should be borne by the funds *prorata*.

Similar formula was applied in *Waters v. Widdows* [1984] VR 503 (Supreme Court of Victoria) when the Receiver was faced with a similar problem.

In the result the amount that will be available from which the claims of the employees are to be paid out will be the sum of RM62,600 less the amount ascertained as the costs and expenses and fees of the Receiver that are attributable to the floating charge realisations and the apportioned prorata costs and expenses of the Receiver that cannot be attributable to either the floating charge realisations or the fixed charge realisations.

For the above reasons we allow the appeal with costs here and below (deposit to be returned to the appellant) and we make the following orders in respects to the various prayers:

1. Prayer (a)(i) - No
2. Prayer (a)(ii), (iii), (iv) - Do Not Arise
3. Prayer (b) - No
4. Prayer (c) - No
5. Prayer (d) - (a) Fixed Charge Realisations

   The claim of the bank will take priority over claims of both the Government (the defendants No. 1 & No. 2) and the employees.

   (b) Floating Charge Realisations

   The employees' claim for the sum of RM21,000 under s. 292(1)(b) of the Companies Act, 1965 will take priority over the claim of the Bank and for the purpose of determining the amount of floating charge realisations that will be available for such purpose, there shall be the following further orders:

   (a) the costs and expenses and fees of the Receiver that are attributable to the realisations of the fixed charge assets be determined by the parties and be deducted from the fixed charge realisations fund.

(b) the costs and expenses and fees of the Receiver that are attributable to the floating charge realisations be determined by the parties.

(c) the costs and expenses of the Receiver that cannot be properly attributable to either the floating charge realisations or the fixed charge realisations be apportioned *prorata* between each fund.

(d) the total of (b) and the prorated amount of costs apportioned to the floating charge realisations in (c) above be then deducted from the sum of RM62,600 and the ultimate balance is the sum out of which the preferential claims of the employees are to be paid.

(e) The parties shall have liberty to apply.

Reported by W.A. Sharif